

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2009 Session

CYDNIE BROWNING O'ROURKE v. JAMES PATRICK O'ROURKE

**Direct Appeal from the Chancery Court for Williamson County
No. 27493 R.E. Lee Davies, Chancellor**

No. M2007-02485-COA-R3-CV - Filed June 5, 2009

Respondent appeals the trial court's judgment finding her guilty on two counts of criminal contempt and imposing a sentence of twenty days in jail, with sixteen days suspended. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which Alan E. Highers, P.J., W.S., joined. HOLLY M. KIRBY, J., filed a separate dissenting opinion.

Connie Reguli, Brentwood, Tennessee, for the Appellant, Cydnie Browning O'Rourke.

Helen S. Rogers and Lawrence J. Kamm, Nashville, Tennessee, for the Appellee, James Patrick O'Rourke.

OPINION

This appeal arises from the November 2007 judgment of the Chancery Court for Williamson County finding Respondent/Appellant Cydnie B. O'Rourke (Ms. O'Rourke) guilty of two counts of criminal contempt for violating the terms of the modified permanent parenting plan entered by the trial court in July 2007. Ms. O'Rourke and Petitioner/Appellee James Patrick O'Rourke (Mr. O'Rourke) were divorced in April 2001 after 28 years of marriage. The parties have nine children, five of whom were minors at the time of the divorce. Pursuant to the parties' MDA and Parenting Plan, Ms. O'Rourke was named custodial parent of the youngest four minor children.

Following considerable post-divorce litigation which the trial court characterized as "long and tortuous," in July 2007 the trial court granted Mr. O'Rourke's petition to change custody and modify child support. By Memorandum Opinion entered on July 10, 2007, and Order entered on July 12, 2007, the trial court awarded sole custody and decision-making for the three remaining minor children to Mr. O'Rourke. In its July 2007 order, the trial court stated that Mr. O'Rourke's

sole decision making authority shall be with respect to every aspect of the minor children's well-being, and [his] Proposed Parenting Plan, as modified by the [c]ourt, and attached as Exhibit B shall be adopted and incorporated herein by reference in its entirety, and shall take effect immediately upon entry of this Order[.]

The amended parenting plan incorporated into the trial court's July 2007 order and attached to that order provided, in relevant part, that Mr. O'Rourke would make all major decisions and that each party would have the rights provided by Tennessee Code Annotated § 36-6-101. The statutory rights were modified, however, to provide that each parent would have "[t]he right to receive from the other parent, in the event the minor child or children leave the Nashville area overnight, an itinerary including telephone numbers, address, etc., for use in the event of an emergency[.]" The parenting plan provided that Ms. O'Rourke's parenting time would be from Thursday when school is dismissed to Monday when school resumes every other week.

In its July 2007, order, the trial court found Ms. O'Rourke to be in willful contempt for failing to follow the directives of the previous parenting plan. In its order, the trial court stated that it "elect[ed] not to impose any punishment" on Ms. O'Rourke at that time. The trial court further stated, however, that "Ms. O'Rourke should heed [the trial court's] warning" and that "[a]ny further findings of contempt [would] result in incarceration in the Williamson County Jail." The trial court additionally found that Ms. O'Rourke was "to blame" for the "astronomical" attorneys' fees in the matter. The court found that Ms. O'Rourke had "consistently done everything in her power to hinder, delay and obstruct the legal process in this case." It ordered Ms. O'Rourke to pay Mr. O'Rourke's attorney's fees in the amount of \$330,799.86.

In September 2007, Mr. O'Rourke filed a petition for criminal contempt alleging that Ms. O'Rourke had removed the parties' two remaining minor children from the state over the weekend of September 22 and 23, 2007, without informing him and without providing him with an itinerary or with emergency contact information. Mr. O'Rourke additionally alleged that Ms. O'Rourke had failed to return the children to school on time on the morning of Monday, September 24, 2007. Mr. O'Rourke alleged that Ms. O'Rourke had willfully disobeyed the trial court's July 2007 order. Mr. O'Rourke further asserted that Ms. O'Rourke was well aware that she was required to notify him and to provide an itinerary and contact information if she intended to take the children out of the Nashville area overnight. He asserted that on July 26, 2007, Ms. O'Rourke took the children to San Diego without providing him with an itinerary, that he objected at that time, and that Ms. O'Rourke provided the information after arriving in San Diego and in response to his threat of a contempt petition. Mr. O'Rourke prayed that Ms. O'Rourke be found in criminal contempt and punished by a fine and/or incarceration for a period of ten days for each offense for removing the children from the Nashville area without providing him with an itinerary or contact information; for failing to return the children to school on time on Monday, September 24, 2007; and for impeding telephone conversation between himself and the children during the week of July 27, 2007. Mr. O'Rourke further prayed that Ms. O'Rourke be enjoined and restrained from taking the children outside the Nashville area without specific advance written permission from him, and for costs and attorney's fees.

Ms. O'Rourke answered on October 25. In her answer, Ms. O'Rourke did not deny taking the children out of the Nashville area overnight without informing Mr. O'Rourke or providing him with an itinerary or contact information, or that the children were late for school on Monday, September 24. Rather, she asserted that modification to the statutory requirement of notice was "hidden from cursory examination of the parenting plan" and that it was "a hidden trap waiting to be sprung." Ms. O'Rourke denied that she had willfully denied the trial court's order because she was "unaware that she had to comply with anything other than the standard requirement." She further asserted that one child was no more than a few minutes late for school, and that the other had missed only the first period of school, physical education, and that she had sent a note to school explaining the circumstances. Ms. O'Rourke denied impeding telephone conversation between the children and Mr. O'Rourke. She prayed for attorney's fees for defending the petition and for costs to be taxed to Mr. O'Rourke.

Following a hearing on October 30, 2007, the trial court found that Mr. O'Rourke had proven, beyond a reasonable doubt, that Ms. O'Rourke was in criminal contempt for failing to provide a travel itinerary and contact information when she took the children to Colorado on September 22-23, 2007. The trial court also found, beyond a reasonable doubt, that Ms. O'Rourke had intentionally taken the children to school late on Monday, September 24, when she "planned for their airline flight to return at such a late hour that they would not reasonably get to bed until after 1:00 a.m. on a school night and that she purposely decided not to take them to school on time." The trial court found that Mr. O'Rourke did not prove, beyond a reasonable doubt, that Ms. O'Rourke had impeded telephone conversation between Mr. O'Rourke and the children. The trial court sentenced Ms. O'Rourke to ten days in the Williamson County jail for each of the two infractions, for a total of twenty days, suspending all but four days of the sentence, and set bond at \$10,000 cash bond. The trial court denied Mr. O'Rourke's prayer for an injunction enjoining Ms. O'Rourke from removing the children from the Nashville area without his advance written permission. The trial court awarded Mr. O'Rourke attorney's fees in the amount of \$7,370.50, and taxed costs to Ms. O'Rourke. The trial court entered its final order on November 16, 2007. Ms. O'Rourke filed a notice of appeal to this Court immediately following the hearing in the trial court on October 30, 2007.

Issues Presented

Ms. O'Rourke raises the following issues, as we slightly reword them, for our review:

- (1) Whether the trial court erred by finding Ms. O'Rourke in criminal contempt where Mr. O'Rourke failed to meet his burden of proof beyond a reasonable doubt on each and every element.
- (2) Whether the trial court erred in setting bond unreasonably without considering the lawful factors, thereby violating Ms. O'Rourke's constitutional right of reasonable bail.

- (3) Whether the trial court erred by awarding Mr. O'Rourke his attorney's fees.
- (4) Whether the trial court committed plain error.

Analysis

Criminal contempt actions have long been used to protect the dignity and authority of the court. *E.g., Robinson v. Air Draulics Eng'g Co.*, 377 S.W.2d 908, 912 (Tenn. 1964). Criminal contempt should be imposed in appropriate cases “when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice.” *Id.* A determination of contempt is within the sound discretion of the trial court, subject to the provisions of the law. *Id.* Generally, the trial court's decision will not be disturbed absent an abuse of discretion. *Id.* One charged with criminal contempt is presumed innocent until found guilty beyond a reasonable doubt. *Id.* On appeal following a finding of contempt, however, the defendant must overcome the presumption of guilt by demonstrating that the evidence preponderates against the trial court's findings. *Id.*

I. Whether the trial court erred by holding Ms. O'Rourke in contempt

In her brief to this Court, Ms. O'Rourke submits that the portion of the July 2007 parenting plan modifying the statutory rights provided by Tennessee Code Annotated § 36-6-101 to require her to provide notice, an itinerary, and contact information to Mr. O'Rourke if she removes the children from the Nashville area overnight is invalid because the changes were not supported by the findings of the trial court in its memorandum opinion. Ms. O'Rourke does not dispute that a trial court has the authority to modify these rights, however, and she does not assert that the language of the trial court's order is vague or ambiguous.

Ms. O'Rourke's argument, as we perceive it, is that the trial court erred by modifying the statutory rights based on the proposed parenting plan submitted by Mr. O'Rourke without making specific findings to support the modification. The trial court's July order incorporating the modified parenting plan was entered on July 12, 2007, however, and was not appealed. Accordingly, it became final and unappealable 30 days after entry. The time for appeal has long since passed, and Ms. O'Rourke may not now challenge the provisions of the parenting plan incorporated into the trial court's final order. This argument is without merit.

Ms. O'Rourke also contends that the trial court's order was not clear and unambiguous as required by *Konvalinka v. Chattanooga-Hamilton County Hospital*, 249 S.W.3d 346 (Tenn. 2008). Although she does not assert that the language of the order is ambiguous, she contends that the “real spirit” of the order is to make sure that the other parent has contact information “for use in the event of the emergency,” and that Mr. O'Rourke was able to contact the children on their cell phones. She asserts, “[t]his Court can not [sic] find as a matter of law that the order under which the contempt action was brought was without ambiguity.”

We must disagree with Ms. O'Rourke on this assertion for three reasons. First, the plain language of the order is clear and unambiguous, regardless of either parties' perception of its "spirit." Second, the order requires each parent to provide the specified information to the other. The trial court's order does not anticipate reliance on the children to serve as the purveys of travel itineraries or emergency contact information. Third, upon review of the entire record in this cause, it is clear to this Court that the trial court and the parenting plan sought to address a repeated lack of communication of travel and contact information.

Ms. O'Rourke further asserts that she did not violate the trial court's order where the decision to allow her children to go to school late was a "discretionary" one. In light of the school attendance record indicating that one child's absence from first period was "unexcused," we cannot agree with Ms. O'Rourke's characterization of this decision. Moreover, we must disagree with the dissent that Ms. O'Rourke's decision to bring the children to school late on Monday following the trip to Colorado falls within the ambit of discretionary parental decision-making in this case. The trial court's order clearly provides that Ms. O'Rourke's parenting time ends upon the resumption of school on Monday. At that time, Mr. O'Rourke's parenting time resumes. Under the circumstances of this case, Ms. O'Rourke's decision to return the children to school late was akin to a decision to return them late to Mr. O'Rourke's custody without notifying Mr. O'Rourke and without emergency circumstances. The trial court's order is clear; Ms. O'Rourke's violation of the order was intentional. Contrary to the dissent, we do not believe that Ms. O'Rourke's expectations regarding whether violating the court's order would result in a finding of contempt is determinative.

Ms. O'Rourke finally asserts that, assuming she did violate the trial court's order, any violation on her part was not willful. Her argument with respect to this assertion is that she believed that the standard parenting rights provided by the Tennessee Code would allow her to remove the children from the state for up to 48 hours without providing Mr. O'Rourke with an itinerary; that she believed one child arrived to school on time; and that the decision to allow the other child to arrive to school late was within her discretion. Regardless of the standard provisions of the Code, the trial court's July 2007 order was, as noted, unambiguous. Ms. O'Rourke's decision to abide by the standard rights contained in the Code in lieu of the trial court's order does not negate the willfulness of her violation of the court's order. Further, despite the dissent's conclusion that Ms. O'Rourke's violation of the trial court's order cannot be said to be willful because Ms. O'Rourke appeared not to have been aware of the modified provisions, the parties' July 2007 email communications regarding Ms. O'Rourke's travel to San Diego with the children belie Ms. O'Rourke's assertions of lack of knowledge. Even if lack of knowledge of an unambiguous and clear order might be considered to excuse non-compliance with that order, the communications contained in the record clearly demonstrate that Ms. O'Rourke was aware that the trial court's order required her to provide Mr. O'Rourke with a travel itinerary and contact information if she took the children out of the Nashville area overnight. The order is unambiguous, and Ms. O'Rourke was aware of its provisions in September 2007. We affirm the trial court's finding of contempt.

II. Whether the trial court erred by setting bond unreasonably in violation of Ms. O'Rourke's constitutional right to reasonable bail.

Ms. O'Rourke next asserts that the trial court set bond arbitrarily and without a bond hearing, and that bond was set without consideration of the factors provided by Tennessee Code Annotated § 40-11-115. She asserts this error was plain error and reversible. Ms. O'Rourke does not assert that she was unable to post the bond required by the trial court, however, or that she was prejudiced or harmed by the trial court's decision. As Mr. O'Rourke asserts, Ms. O'Rourke's argument is that the trial court erred by setting bond despite her failure to object to the bond at any time in the trial court. The constitutionality of the bond was not raised at the October 2007 hearing or in any post-judgment motion, and it cannot be raised for the first time on appeal.

III. The award of attorney's fees

Ms. O'Rourke asserts that, under the statutes providing for contempt proceedings, the trial court erred by awarding Mr. O'Rourke his attorney's fees. She asserts that attorney's fees in this case are contemplated by neither statute nor agreement. The MDA contained in the record, however, which provides that both it and the parenting plan provisions for child custody and support are to be incorporated into the final decree of divorce, states that the prevailing party will be entitled to attorney's fees in an action to enforce any provision of the agreement. We affirm the award of attorney's fees in this case.

IV. Whether the trial court committed plain error

In her brief to this Court, Ms. O'Rourke asserts the trial court committed plain error by violating her constitutional rights. She also asserts that the trial court's bias against her is evidenced by the court's "inflammatory" remarks about Shawn Sanders, one of the parties' older children who, as Ms. O'Rourke asserts, was not an "issue" in this matter. Apart from making these assertions, Ms. O'Rourke presents no argument with respect to the trial court's alleged plain error. In light of our holding with respect to the trial court's finding of contempt, Ms. O'Rourke's assertion of plain error is without merit.

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Mr. O'Rourke's requests for attorney's fees on appeal is denied. Costs of this appeal are taxed to the Appellant, Cydnie B. O'Rourke, and to her surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE